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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1521

HERBERT BREGER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MURRAY APPLEMAN
Attorney for Petitioner
A Member of the Bar of the
United States Supreme Court
225 Broadway
New York, N.Y. 10007
(212) 349-6966

DICK BAILEY PRINTERS, 290 RICHMOND AVE., S.I., N.Y. 10302

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IN THE
SUPREME COURT OF THE UNITED STATES
No.
OCTOBER TERM 1979

HERBERT BREGER,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

The petitioner Herbert Breger prays that a writ of certiorari issue to review a final judgment and order of the United States Court of Appeals for the Second Circuit, entered February 28, 1980 (Appendix A, infra), which affirmed the judgment of the United States District Court, Eastern District of New York, entered on August 21, 1979, convicting him of income tax evasion, after a jury trial, on each of three counts pursuant to Internal Revenue Code Section 7201, tax evasion, and 7206 (1), false statements, for the years 1972, 1973 and 1974. As a consequence petitioner was sentenced to concurrent terms of three months incarceration and 21 months probation on each count.

THE OPINION OF THE COURT BELOW

The opinion of the Court below namely the United States Court of appeals for the Second Circuit, affirming the judgment of conviction is set forth in Appendix A, infra, as aforesaid.

JURISDICTION

The Order of the judgment of the United States Court of Appeals for the Second Circuit, the Court below, is dated February 28, 1980. The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1254 (1).

QUESTIONS INVOLVED

A. Government failed to sustain its burden of proving a starting point with reasonable certainty.

B. Charts should not have been admitted into evidence.

C. Failure to report as gross income the total amounts received from activities with regard to sales of tapes and records, did not justify a 7206(1) conviction and spillover from incorrect interpretation of cash expenditure method of proof barred the jury from proper consideration of same.

D. Denial of defendant's requested charge with regard to reasonable doubt.

E. Agent's pervasive testimony rendered it useless and Court should have ordered testimony stricken so as to avoid confusion and prejudice.

THE PRINCIPAL CONSTITUTION AND STATUTORY PROVISIONS INVOLVED:

Fifth Amendment to the Federal Constitution, in part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; . . . nor be deprived of life, liberty or property without due process of law; . . . "

Sims v. Rives, 1936, 84 F2d 871 cert. den. 298 U.S. 682:

> "Constitutional guaranty that no person shall be deprived of life, liberty or property, without due process of law implies equal protection of laws."

Title 26 U.S.C. §7201. Attempt to evade or defeat tax:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony, and upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Title 26 U.S.C. §7206. Fraud and false statements:

> "(1) Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

STATEMENT OF THE CASE

During the years 1972, 1973 and 1974, petitioner was employed as a General Manager in his father-in-law's retail camera business (N.Y. Camera Exchange) and involved with regard to sales of records and tapes as a side enterprise. Income from each was reported on the petitioner's income tax returns.

Utilizing the expenditure method of proof, the government attempted to show that Breger spent monies in excess of reported earnings and availability from known bank accounts exceeding $14,000 in 1972, $17,000 in 1973 and $7,000 in 1974. However, when considering loan repayments (cash and check), a portion of which was deposited to petitioner's bank accounts, which were attested to at trial by government witnesses and related (specifically a Mr. Ashe, one of the borrowers) to the government agents, the latter apparently consciously avoiding any information advantageous to the petitioner, these expenditures possibly exceeded reported income by only $8,000 in 1972, $8,000 in 1973 and $2,000 in 1974.

The foundation or the predicate of any expenditure case, circumstantial evidence based on approximations, is the starting point or monies available or accumulated prior to the years involved herein. Expenditures in excess of earnings on non-deductible items during a given period indicate that a taxpayer 1) lived in part off capital or 2) borrowed more money than he paid back during the period or 3) had non-taxable accessions to wealth or 4) underreported income. The first three possibilities consistent with a correct return, probably occur in the aggregate more than the fourth. It should also be noted that in the extant situation, during circumstances of an inflationary period, the disputed amount is not excessive.

Government efforts to meet its threshold requirement with regard to a circumstantial evidence case of this type

was 1) to employ an admitted inaccurate, incomplete, financial statement submitted with regard to a 1969 Breger mortgage application, which did not require a listing of cash on hand, solely utilized as an investigative tool; 2) tracing kown inheritance property and monies received from his mother's estate in 1968; 3) tracing known bond and stock purchases, without any evidence of Breger ever having to borrow funds or pay interest on articles purchased via credit cards or otherwise during the period prior to or during this investigation. The Second Circuit Court of Appeals stated that based on these facts a defendant must adduce specific evidence such as cash horde, to suggest that the starting point was inaccurate or misleading.

Thus during the immediate periods involved herein, there was no evidence or indicia that Breger was forced to live frugally, ever needed or lacked cash availability nor was it shown by the government that Breger's mother, in view of the size of the estate, did not or could not have given him funds prior to her demise, which were not banked. Further the government failed to examine income tax returns for the periods prior to 1969 and expenditures to possibly indicate insufficient income to accumulate a small cash horde as herein involved.

Due to their failure to accomplish this normal approach to ascertain availability or unavailability of cash on hand, it can be assumed that this evidence would be favorable to the petitioner.

REASONS FOR GRANTING THE WRIT

A. Government Failed to Sustain its Burden of Proving a Starting Point with Reasonable Certainty.

In the *Holland* case, 348 U.S. 121, 75 S. Ct. 127, the Supreme Court stated that an essential condition in a net worth determination of income is the establishment with "reasonable certainty" of an opening net worth to serve as a starting point from which to calculate future increases in the taxpayer's net worth. The wisdom of this statement is apparent since an inaccurate beginning net worth will affect the accuracy of the determination of income subsequent to the base point. For instance, if a taxpayer's beginning net worth is understated, taxable income for the period under consideration will be overstated. Thus an accurate and definite showing of an opening net worth is the keystone of the calculation process. *U.S. v. Calles,* (5th Cir., 1973), 482 F. 2d 1159. The correctness of the result depends entirely upon the inclusion in the opening figure of all assets on hand.

The expenditures method is, on theory, closely related to, if not identical with, the net worth method of proving income. The method is based on the theory that if the taxpayer's expenditures during a given year exceed his reported income, and the source of such expenditures is unexplained, it may be inferred that such expenditures represent unreported income.

The cash expenditure method is devised to reach a taxpayer who construes his self-determined tax-free dollars during the year and winds up no wealthier than before. This is accomplished by establishing the amount of goods and services which are not attributable to the resources at hand at the beginning of the year or to non-taxable receipts during the year.

One Court noted the similarity of the net worth and expenditures method by the following statement:

> ". . . The two computations are merely accounting variations of the same basic method, the expenditure theory being an outgrowth of the net worth method."

Mc Fee v. U.S., (9th Cir. 1953), 206 F. 2d 872. It was also stated therein that employing either the expenditures method or the net worth method the Government must determine with reasonable certainty the taxpayer's beginning net worth in order to have a starting point. The approach to this matter is the same irrespective of which method is used.

In *Taglianetti v. U.S.,* (1st Cir., 1968), 398 F. 2d 558, the First Circuit was confronted with the question of what evidence would satisfy the requirement of *Holland v. U.S., supra.* It was therein stated that in a typical net worth case, as *Holland,* precise figures would have to be attached to opening and closing net worth positions for each of the taxable years to provide a basis for the critical subtraction. In a cash expenditures case reasonable certainty may be established without such a presentation, as long as the proof makes clear the extent of any contribution which beginning resources or a diminution of resources over time could have made two expenditures. The above passage from *Taglianetti* was quoted with approval in *U.S. v. Bianco,* (2nd Cir., 1976), 534 F. 2d 501, and *U.S. v. Fisher,* (2nd Cir., 1975), 518 F. 2d 836. The Court of Appeals for the 7th Circuit stated:

> "Remembering that the Government has the burden of proof in a criminal case, that the burden never shifts to defendant, that circumstantial evidence must be of such character as to exclude every reasonable hypothesis except that of guilt, it necessarily follows that, when the Government relies upon circumstances of increased net worth and

expenditures in excess of reported income to establish income tax evasion, the basic net worth must be established. The dsefendant is not compelled to make proof that he is innocent but he must be proved guilty by the evidence beyond all reasonable doubt, and where there is uncertainty as to whether all the assets of defendant are included in the Government's computation of net worth, it follows that it's computations cannot be relied on. The essential proof of no other assets is the cornerstone of the evidence of the Government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubts."

See *U.S. v. Fenwick,* 177 F. 2d 488.

A similar warning was given by the Court of Appeals for the 5th Circuit:

"This is another of the growing list of criminal cases in which the Government, having no or little direct evidence of defendant's guilt to offer and endeavoring to prove it by circumstantial evidence, attempts to do so by what may be called the net worth and expenditures method of proof. In this attempt unless the greatest care is taken by the District Judge to prevent it, there is danger of the case being tried on a theory which, keeping to the ear the promise that a defendant is presumed innocent until his guilt is established beyond a reasonable doubt, breaks it to the hope by allowing a series of theoretical estimates and computation as to defendant's income to take the place of proof of it.

"Sometimes conclusions from these computations and estimates are allowed to invade the province of the jury and furnish the basis for a conviction not upon evidence of facts but upon speculation and theorizing by the Government witnesses as to what the facts really are.

"Sometimes without adhering to the essentials of the method, that the net worth at the beginning as well as the end of the period be shown, the proof comes in and the case is submitted with a complete gap in the proof as to the beginning of the period.

"This kind of latitudinous allowance of the admission and use of conclusions as evidence and the submission of the case to the jury without a scrupulous adherence to the theory, has resulted in a tendency to accept, if not in the complete acceptance of, the idea that in a case tried by this method, ordinary rules of proof may be relaxed if not disregarded. Further and more prejudicial to a defendant there has grown up a kind of ancillary theory that the Government, by introducing proof of deposits, expenditures, etc. having put up what is called a prima facie case, the defendant finds himself jockeyed out of the position the law affords him of insisting that the Government establish his guilt by legal and credible evidence beyond a reasonable doubt. This is accomplished by requiring him to prove himself innocent by assuming the burden of overcoming the prejudicial effect of the mass of exhibits, estimates, projections, and conclusions which the Government has been allowed to get into the record, upon the apparent theory that it is up to the defendant to explain all of it away as part of the burden to prove his innocence.

"This Court and other Courts have in many cases, pointed out the dangers attending trials conducted in this way. Some of them have at times seemed to be more concened in easing the difficulties attendant to proof of guilt by this method than with preserving unimpaired the constitutional rights of a defendant, the fundamental safeguards and guarantees of his liberty. Most of the Courts however confronted with the situation which this kind of case presents, have withstood all attacks upon and held fast to, constitutional principles, including the fundamental premise upon which criminal trials proceed, that the defendant is presumed innocent until his guilt is established by legal and admissible evidence beyond a reasonable doubt."

See *Demetree v. U.S.,* (5th Cir., 1953), 207 F. 2d 892.

The Court in *Dupree v. U.S.,* (5th Cir., 1955), 218 F. 2d 781 made it altogether clear that in cases where the expenditures method of proof is employed, the Government

must present evidence that sufficiently excludes the possibility that the defendant relied on previously accumulated assets rather than on unreported taxable income. Subsequent decisions have made clear that the Government may establish the opening available funds for a beginning year and proceed to show the total of taxable and non-taxable receipts for the following consecutive years to prove its case. Where that is done the opening available funds for the beginning year (gifts, inheritance, and the like) and income received less disbursements paid during the beginning year establish the opening available funds for the following year. In addition to establishing a defendant's opening available funds, the Government also has the burden of proving that the expenditures in question were not made from other non-taxable sources, such as gifts, loans, or bequests. See *U.S. v. Lydell Marshall* (5th Cir., 1977), 557 F. 2d 529 affirming unreported D.C. decision.

It is part of the government's burden of proof to establish beyond a reasonable doubt that the expenditures came from taxable income for the very years in question since our income tax system is on an annual basis, and failure to report income must be charged for a specific year.

There is always the possibility that the taxpayer utilized cash that he received from an untaxable source (i.e., mother's gifts prior to death) or from income taxed in a prior year but kept on hand as cash or even from unreported income from a prior year kept on hand in cash. Such events are common human occurrences and this possibility may of itself create reasonable doubt. Therefore the government must establish the amount of cash the taxpayer had on hand at the start of the period. See *U.S. v. Bianco,* (2nd Cir., 1976), 534 F. 2d 507, cert. den. 1976, 429 U.S. 822, suggesting that in a cash expenditure case, proof of a likely taxable source does not suffice to relieve the prosecution of its duty to negate probable sources of untaxable income.

The function of legal process is to minimize risk of erroneous decisions. The function of standard of proof, as that concept is embodied in the due process clause and in the realm of fact-finding, is to instruct the fact-finder concerning degree of confidence society thinks he should have in correctness of factual conclusions for a particular type of adjudication. The beyond a reasonable doubt standard historically has been reserved for criminal cases. This unique standard of proof, has been given constitutional status and it is regarded as a critical part of the "moral force of the criminal law." *In Re Winship,* 397 U.S. 358 at 364 (1970). The heavy standard applied in criminal cases manifests concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free. *Patterson v. New York,* 432 U.S. 197, 208 (1977). The due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

The threshold or foundation (not a gratuitious defense) with regard to a circumstantial evidence case based on expenditures is the opening amount available from previous resources. Government failure to provide a basis for this threshold requirement, operated to remove this issue from the jury and a directed verdict of acquittal, which is not a finding of innocence but only a refusal to find guilt, is required. See *Helvring v. Mitchell,* 303 U.S. 391, 397 (1938).

Mullaney v. Wilbur, 421 U.S. 624 (1976) on a straightforward reading, seems to hold that if a fact is important enough for serious criminal consequences to turn on it, then it is important enough to require proof by the government beyond a reasonable doubt. The reasonable doubt rule applies to proof of facts that are constitutionally necessary for liability of guilt.

The Courts in accepting the circumstantial evidence of expenditures require that the government establish a starting point as the keystone of the calculation process. This is not a gratuitous defense. Thus the consequence of an erroneous determination of the issue of a starting point would result in an erroneous criminal conviction subjecting the defendant to potential incarceration, an error too serious to be permitted to be exempt from the rigors of the *Winship* rule. 421 U.S. at 699, 700.

Here the government admits to having no statement from the defendant relative to the amount of cash on hand available for any period. In its attempt to meet its burden of proof to essentially establish an accurate cash on hand figure as of December 31, 1971, an admitted inaccurate, incomplete financial statement, submitted with regard to a mortgage application, was utilized. The latter not requiring a listing of cash on hand was solely employed as an investigative tool. By tracing known bond and stock transactions and known assets inherited from Breger's mother, devoid of any proof as to Breger's lack of available funds in any year or payment of interest on articles purchased via credit cards, a conclusion was made that Breger had no funds on hand. The Second Circuit decision would indicate that appellant must adduce specific evidence such as cash on hand in order to suggest that a starting point was inaccurate or misleading, i.e., a shifting of the burden of proof.

This structure reduced this case to a simplified assessment of what might be called "the chances of guilt" which is fundamentally at odds with the concept of reasonable doubt. A distinction must be made between the burden of persuasion, which regulates the decision of close cases by the fact finders, and the burden of producing evidence which specifies the result where the evidence on the issue is non-existent or inadequate to satisfy some threshold requirement. Authorizing jurys to find facts despite uncer-

tainty and/or lack of predicate, encourages arbitratiness thereby subverting the jury's role as a finder of fact demanding the most stringent level of proof.

An irrational, permissive inference on culpability drawn from the predicate here, i.e. no cash on hand, has no place in the criminal law in any form and ought to be invalidated. See e.g. *U.S. v. Black,* 512 F. 2d 864 (9th Cir., 1975).

No analyzation was made as to the availabilty of funds in or from prior years. Evidence must carefully trace the financial history of a defendant and disclose expenditures in excess of reported resources in a period immediately preceding the indictment years to sufficiently support a finding that there was no cash horde. *Friedberg v. U.S.,* 348 U.S. 142, 144, 75 S. Ct. 138, 99 L. Ed. 2d 188 (1954).

In asking the jury to rely on these analyses as a basis for deciding that the taxpayer willfully understated his true income, the government necessarily relies on circumstantial evidence. *U.S. v. Slutsky* (2nd Cir., 1973), 487 F. 2d 832, 839 cert. den. 416 U.S. 937 (1974). There is always the possibility that the taxpayer's deposits consists of monies received from an untaxable source or from income tax in a prior year but kept on hand as cash or even from unreported income from a prior year kept on hand in cash.

By failing to analyze income and expenditures for the prior periods the government has absolutely no competent evidence which in any way suffices to clearly and accurately establish with reasonable certainty the extent of defendant's prior assets at the inception of any of the indictment years. Further the government failed to follow leads developed during its investigation with regard to the repayment of the Cooperstone loans and consciously avoided any evidence that would exculpate the defendant.

It is evident that the application of the expenditure method of proof herein has neither a head nor a tail and will not do since the required starting point has not been established.

The labarynth of slender threads woven by the agents to determine a zero net worth cannot be sustained as complying with the requirement of an accurate and definite opening net worth or making clear the extent of any contributions which beginning resources could have made to expenditures. The government's evidence fails to provide substantial and sufficient support for the jury to conclude defendant's zero cash on hand at the close of 1971 has been established with the requisite reasonable certainty.

Great care should be observed in the exercise of judicial discretion to the end that no shifting of the burden placed upon the prosecution to prove guilt results in requiring to any degree or extent that a defendant prove his innocence. The burden of proof must remain on the prosecution to establish guilt. The administration of justice is not a game of chess or of hide and seek. It is a search for truth and the application of the law to the true facts in order that substantial justice be done under the law. The prosecution must not be permitted to introduce evidence which is not so indicative of guilt as to freely point to guilt and cast a burden on the defendant to disprove an unfair implication or inference. The use of evidence which in fairness should not under the circumstances be deemed to have satisfied the government's burden of proving a starting point improperly cast the burden upon the defendant to explain the source of these expenditures.

B

Charts should not have been admitted into evidence.

Government's proof was based on the non-deductible expenditure method of proof. Government's chart as submitted into evidence over counsel's objection incorrectly: 1. Added a $900.00 expenditure in 1973, concededly improper. 2. Added itemized deductions as additional expenditures in the amount of $1,456.15 for 1972, $1,834.13 for 1973 and $2,341.05 for 1974, which amounts were reflected in other expenditures listed and properly should have reduced the amount of gross expenditures to arrive at the amount of expenditures to be compared with income. 3. Improperly reduced availability of funds in the amount of $1,000.00 capital loss deductions claimed on income tax returns filed for the periods involved herein, which were reflected in the availability of funds via the amount used for purchases and the amounts received from sales of stock. 4. Due to the lack of a comprehensive investigation plus a conscious avoidance by the investigating agents to obtain any evidence beneficial to petitioner, $21,600.00 of loan repayments attested to by government witnesses was omitted from the chart. This in spite of the fact that the uncontroverted evidence proved that a Mr. Asche, interviewed by the agents, informed them of the repayment plus the fact that $5,000.00 of the repayment was deposited to petitioner's bank account. 5. Additional deductions entitled to by the taxpayer in each of the years, i.e., interest deductions regarding loans not claimed as deductions, was not reflected on the chart. 6. Incorrectly listing health insurance premiums at $300.00 rather than $150.00.

A summary exhibit particularly a government summary or chart, should present an accurate representation

of the evidence that has been presented and should not express conclusionary, argumentative or prejudicial statements, tending to state as fact, the mere opinion of the person preparing it.

In *U.S. v. Altruda,* (C.A. 2, 1955), 224 F. 2d 935, it was held that since the schedule did not conform to the government evidence or fully state the facts of the case, it was error for the Court to admit them into evidence. In *U.S. v. Vardini,* (C.A. 2, 1962), 305 F. 2d 60, the failure to reflect in the summary the proper deduction to which the taxpayer was entitled constituted reversible error. Even though the error was considered small, the Court held it was material enough to necessitate reversal. In *Flemister v. U.S.,* (C.A.—5, 1958), 260 F. 2d 513, it was held that if a summary purports to be a mathematically correct statement of the evidence, then the inclusion of clearly improper items cannot be dismissed as non-prejudicial. Further that the government summaries in order to be admissible, must be accurate reflections of what they purport to be, that is, either a summation of the evidence given by one set of witnesses or a summary of all the evidence.

The summary allowed into evidence was not a fair representation of the government's evidence, inaccurate and the information contained in the exhibit, based on cross-examination, went beyond the capacity of the expert who prepared it.

Expert testimony and illustrative charts are permissible as long as the assumptions upon which they are based are supported by evidence in the case. However, if the particular charts were misleading or prejudicial, their introduction signals error. The burden of setting forth the deficiencies in specific terms that can be followed is on the defendant. *U.S. v. Jalbert,* (1st Cir., 1974), 504 F. 2d 892, 894. Under the rule authorizing summarization of evidence, summary or chart must be accurate, authentic and properly introduced before it may be admitted into evidence. Federal Rules of Evidence, Rule 1006.

The technical errors conceded reflected on the charts submitted into evidence involved: (1) adding to expenditures amounts spent for tax deductible items, reflected in cash expenditures; (2) deducting from cash availability, $1,000 in each of the years for capital losses claimed on the returns, reflected in purchase and sales of stock; (3) not allowing additional deductions revealed by the investigation.

In view of the small amount involved herein as alleged excess expenditures over income reported, the charts must be deemed not to have met the prerequisites of being accurate, authentic or proper. The admitted errors and misinterpretation of the effect of items must be deemed so prejudicial as to require reversal of the convictions. Due to the omissions, misinterpretations and discrepancies between the record and exhibits on the Government's charts, an attempt was not merely made to summarize the testimony. On the contrary, the government undertook to evaluate the evidence, endeavoring to pass upon the reliability and credibility of certain witnesses and to determine what weight should be given their testimony, so that, with regard to the exhibits being sent to the jury, the government through its witness invaded, indeed took over the province of the jury. *Steele v. U.S.,* (5th Cir., 1955), 222 F. 2d 628.

As was stated by the Supreme Court in *Holland v. U.S., supra,* with regard to the use of summaries:

> "Here figures have a way of acquiring an existence of their own independent of the evidence which gave rise to them."

Thus careful examination of these charts was required and due to their inaccuracy, prejudicial impact and misleading conclusions should not have been permitted to be accepted as evidence.

The chart was a structure which reduced this criminal case to a simplified assessment of what may be called

"chances of guilt", which is fundamentally at odds with the concept of reasonable doubt. It should not be used as a mode of determining ultimate questions of innocence or guilt.

C

Failure to report as gross income the total amounts received from activities with regard to sales of tapes and records, did not justify a 7206(1), I.R.S. conviction, and spillover from incorrect interpretation of cash expenditure method of proof by the jury from proper consideration of same.

Breger's side enterprise with regard to the sales of records and tapes involved the following amounts:

1972	$35,980.00
1973	50,000.00
1974	8,250.00

In each of these years, Breger reported commissions from these sales approximating $1,200.00. Although payments for these sales went directly to Breger, all of the witnesses stated that sales from Breger were on a COD basis, unusual in an industry where terms for payments are usually granted. They further stated that his prices were cheaper than average and that no inventory was seen. It would appear that Breger was acting as a commission merchant or agent.

The gist of the offense pursuant to an indictment under Code Section 7206(1) is a false statement, willfully made of a material matter. *Kolaski v. U.S.*, (5th Cir.) 362 F. 2d 847. The Government has the burden of proving every essential element of a crime beyond a reasonable doubt. *Small v. U.S.*, (1st Cir.) 255 F. 2d 604. The

Government's burden herein is to show that the taxpayer had no other choice but to include the entire amount received as gross income on Schedule C and the materiality of this alleged omission. A finding of scienter is also required. The mere failure to make a complete and accurate report of income for taxation is less than enough to support a verdict. The failure must have been willful in a sense that it was with intent to attempt thereby to evade payment of income tax which would have been shown by a correct return to have been lawfully payable.

The accountant who prepared these returns stated that he believed that Breger was not in business and was acting as agent in selling these items and that one acting as an agent does not have to file a Schedule C. The Government's expert witness, Burbank corroborated the former and stated "if the amounts were received on behalf of a principal, Breger would not have to report these amounts received as gross income." No evidence was elicited that Breger maintained an inventory or that he could sell more of an item than was offered or operated a regular and systematic business which is consistent with the claim that Breger, per se, was not in the business of buying and selling records and tapes but merely acting as a middle man or conduit or agent. Burbank on direct testimony, not in the heat of cross-examination, voluntarily stated that his inaccurate, incorrect, additional income as reflected by his schedules could have been derived from the sale of these records and tapes. This would appear to have been a planned statement in Burbank's continued efforts to justify his incorrect conclusions. This was objected to and sustained, but it was already implanted in the jurors' minds.

The Internal Revenue Service has recognized that amounts received by an agent on behalf of a principal, and turned over to the principal, are not taxable to the agent under Code Section 61(a). Revenue Ruling 76-479, 76-2 C.B. 20. Defendant has not been shown to have a regular

and systematic business with regard to tapes and records, had no office or warehouse, no inventory and it becomes apparent that he was acting as an agent for other dealers in records and tapes. If business transactions between parties require cross-payments, the gross income of either party from the transaction is the excess of amounts received over payments made. See *c.f. Schmitt,* 30 T.C. 322 (1958) affirmed on other issues (Ca.-9) 271 F. 2d 301.

It is evident that due to the aforementioned uncertainties of if or how the amounts received should be reported, that as a matter of law, the defendant cannot be guilty of a criminal violation. As a matter of law the requisite intent to evade and defeat income tax is missing. The obligation to report the entire amount as income is so problematical that defendant's actual intent is irrelevant. Even if it could be shown that he had consulted the law and sought to guide himself accordingly, he would have had no certainty as to what the law required. See *Amy T. Critzzer,* (4th Cir., 1974), 498 F. 2d 1160.

It should be further noted that when there is sufficient doubt as to the meaning of the provisions of the Internal Revenue Code as applied to the facts of this case, all doubt must be resolved in favor of the taxpayer. *Porter v. Commissioner,* 288 U.S. 436, 442, 53 S. Ct. 451, 77 L. Ed. 880 (1933). It is settled that when the law is vague or highly debatable, a defendant, actually or imputedly, lacks the requisite intent to violate it. In *James v. U.S.,* 366 U.S. 213, 81 S. Ct. 1052, 6 L. Ed. 2d 246 (1961) when the Supreme Court decided that embezzled funds were taxable income, it nonetheless reversed James' conviction under Code Section 7201. Former Chief Justice Warren in a three Justice plurality opinion stated:

> "We believe that the element of willfulness could not be proven in a criminal prosecution for failing to include embezzled funds in gross income in the year of misappropriation so long as the statute, contained a gloss placed upon it by Wilcox at the time the alleged crime was committed."

Justices Black and Douglas agreed with the decision further stating:

> ". . . A criminal statute that is so ambiguous in scope that an interpretation of it brings totally unexpected results, thereby subjecting people to penalties and punishments for conduct for which they could not know was criminal under existing law raises serious questions of unconstitutional vagueness. 366 U.S. at 224."

The Supreme Court in its recent decision with regard to withholding tax on employee meal reimbursements, *Central Illinois Public Service Co. v. U.S.,* 98 S. Ct. 917 (1978) stated that prior to an employer being liable for the civil liability for withholding tax the obligation to withhold must be "precise and not speculative."

It may be that corrective instructions and/or sustained objections are no more than an empty ritual without any effect on the jurors. Verdicts in criminal cases often find their real spring in the atmosphere generated in and by the trial with things felt but unseen sometimes real, sometimes illusory, arising out of, but more than, the relevant and admissible evidence in the end more influence the verdict than does the relevant testimony. See *Ford v. U.S.,* (5th Cir., 1954), 210 F. 2d 313, 317, 318 *cert. den.* 352 U.S. 833 (1956).

Under the circumstances herein extreme prejudice was caused by this remark and when considered in conjunction with the erroneous charts placed before the jury, i.e., spillover of the effect of both items, probably caused the jury's verdict of conviction.

D

Denial of Defendant's Requested Charge With Regard to Reasonable Doubt.

Defendant in his request to charge requested that reasonable doubt be defined as follows:

> "In order for you to find the defendant guilty of the offenses charged in the indictment, there must be such proof as satisfies your reason as intelligent people beyond any reasonable doubt that the defendant is guilty as charged.
>
> "The choice of an appropriate burden of proof depends in large measure on society's assessment of the stakes involved in a judicial proceeding. The standard of 'proof beyond a reasonable doubt' is constitutionally mandated for elements of a criminal offense. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the fact-finder of his guilt. It is critical that the moral force of a criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. If quantified, the beyond a reasonable doubt standard might be in the range of more than ninety-five percent probable. *U.S. v. Schipani,* 289 F. Supp. 43, 57 E.D.N.Y., 1968, aff'd. 414 F. 2d 1262, (2nd Cir., 1969). *U.S. v. Daniel Fatico,* E.D.N.Y., 1978, 458 F. Supp. 388."
>
> "In other words proof beyond a reasonable doubt is only established if the evidence is such as you would be willing to rely and act upon it in the very most important of your own affairs. The defendant is not to be convicted on mere suspicion, conjecture or possibility. A reasonable doubt exists when after careful and impartial consideration of all the evidence, the jurors individually and collectively, do not feel convinced to a moral certainty, i.e., ninety-five percent quantum ratio that the defendant is guilty of the crime charged."

The Court refused this request and instead used the following:

> "What is a reasonable doubt?
>
> "The words almost define themselves, that there is a doubt founded in reason and arising out of the evidence in the case, or the lack of evidence. It is a doubt which a reasonable person has after carefully weighing all of the evidence.
>
> "Reasonable doubt is a doubt which appeals to your reason; to your judgment; to your common sense and your experience. It is not caprice, whim, speculation, conjecture or suspicion; it is not an excuse to avoid the performance of an unpleasant duty, it is not sympathy for a defendant.
>
> "If, after a fair and impartial consideration of all the evidence, you can, candidly and honestly, say you are not satisfied of the guilt of a defendant, that you do not have an abiding conviction of his guilt, in sum, if you have such a doubt as would cause you, as prudent persons, to hesitate before acting in matters of importance to yourselves, then you have a reasonable doubt and in that circumstances it is your duty to acquit.
>
> "If, on the other hand, after such an impartial and fair consideration of all the evidence, you can, candidly and honestly, say you do have an abiding conviction of a defendant's guilt, such a conviction as you would be willing to act upon in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt, and under such circumstances, it is your duty to convict.
>
> "Reasonable doubt does not mean a positive certainty or beyond all possible doubt."

The moral force of the criminal law should not be diluted by a standard of proof that leaves men in doubt whether innocent men are being condemned. *In Re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, 25 L Ed 2d 368 (1970). As Chief Judge Cardozo so aptly put this matter:

"The genius of our criminal law is violated when punishment is enhanced in the face of a reasonable doubt as to the facts leading to enhancement. *People v. Reese,* 258 N.Y. 89, 179 N.E. 305, 308 (1932)."

It is more appropriate and descriptive to define a term positively than to state what it is not. It would appear that a more descriptive definition of reasonable cause is presented when the jury is given its quantitative worth.

When anything more than a simple caution and a brief definition is given, the matter tends to become one of mere words, and the actual effect upon the jury, instead of being enlightenment is likely to rather be confusion or at the least a continued incomprehension.

E.

Agent's Pervasive Testimony Rendered it Useless and Court Should Have Ordered Testimony Stricken so as to Avoid Confusion and Prejudice.

Agent's testimony as described previously was inaccurate, misleading and pervasive throughout.

Thus the confusion and prejudice caused by this testimony rendered it useless. See *U.S. v. Celentano,* 391 F. Supp. 1252 (S.D.N.Y. 1975), and his testimony should have been stricken in accordance with the motion made by defense counsel (324-325).

CONCLUSION

It is respectfully submitted that this petition for certiorari be granted.

Respectfully submitted,

MURRAY APPLEMAN
Attorney for Petitioner
A Member of the Bar of the
United States Supreme Court

Appendix A—Opinion of the U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 662—September Term, 1979

(Argued January 22, 1980

Decided February 28, 1980)

Docket No. 79-1395

UNITED STATES OF AMERICA,

Appellee,

—v.—

HERBERT BREGER,

Appellant.

Before:

OAKES, VAN GRAAFEILAND, and NEWMAN,

Circuit Judges.

Appeal from convictions of tax evasions and false statements, I.R.C. §§7201, 7206(1), in three taxable years, before the United States District Court for the Eastern District of New York, George C. Pratt, *Judge*.

Affirmed over principal contentions of insufficiency of evidence and reliability of opening net worth evaluation.

MURRAY APPLEMAN, New York, N.Y., *for Appellant.*

RHONDA C. FIELDS, Assistant United States Attorney (Edward R. Korman, United States Attorney for the Eastern District of New York, Vivian Shevitz, Assistant United States Attorney, of counsel), *for Appellee.*

PER CURIAM:

This appeal is from convictions after a jury trial in the United States District Court for the Eastern District of New York, George C. Pratt, Judge, for three counts of tax evasion, in violation of I.R.C. § 7201, for the years 1972, 1973, and 1974, and three counts of false statements in tax returns, for the same years, in violation of I.R.C. § 7206(1). We affirm.

Appellant makes two principal arguments on appeal. He first contends that a motion for directed verdict should have been granted, because the excess funds revealed by the expenditure method of proof resulted not from record and tape sales but from repayment of loans. His supporting evidence at trial consisted primarily of testimony from his brother-in-law, father-in-law, and a close family friend, to the effect that they

repaid Breger certain cash during the tax years in question. Appellant also claims that he was not a principal but merely an agent for other dealers in the sale of records and tapes. But the Government's proof consisted of invoices in appellant's name and cancelled checks made out to appellant from three record companies for over $90,000. And the testimony as to the cash "repayments" was totally unsubstantiated by any documentation such as books, records, notes, receipts, or the like. We think that these are precisely the sort of factual issues designed for submission to a jury, *see Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974), which in this case apparently did not accept appellant's version of the story. In any event, even assuming appellant were correct as to each of the alleged repayments, he still substantially understated his taxable income—by more than $17,000.[1]

Appellant's other principal argument attacks the reliability of the Government's opening net worth evaluation. The net worth/expenditure method for proving tax evasion necessitates the establishment with reasonable certainty of a starting point. *Holland v. United States*, 348 U.S. 121, 132 (1954); *McFee v. United States*, 206 F.2d 872, 874 (9th Cir. 1953), *vacated and remanded*, 348 U.S. 905, *aff'd upon reconsideration per*

1 The argument that the Government did not investigate the repayments under the "leads" doctrine, *see Holland v. United States*, 348 U.S. 121, 135-36 (1954), is without substance. Even if the doctrine were applicable the evidence was sufficient to convict. But appellant had not advised the Government of the supposed cash receipts, his close friend had not done so when interviewed, and their joint attorney never produced the supposed documentation—stock purchase orders—underlying the "loan" and "repayment." In other words there were not "leads" to follow, only afterthoughts.

curiam, 221 F.2d 807 (5th Cir.), *cert. denied*, 350 U.S. 825 (1955) (expenditure and net worth methods of proof in tax evasion cases are essentially same method). The Government must affirmatively prove an initial amount available to the taxpayer, with evidence that excludes the possibility that the defendant relied on previously accumulated assets rather than unreported taxable income, *United States v. Marshall*, 557 F.2d 527, 530 (5th Cir. 1977), without refuting all possible speculation as to sources of funds, however. *McFee v. United States*, *supra*, 206 F.2d at 874. We think the Government met its burden here. It used information gleaned from a 1969 mortgage application, traced a real estate and cash inheritance from appellant's mother in 1968, and investigated bond statements and checking accounts in order to ascertain appellant's access to funds as of January 1, 1972. We note that appellant adduced no specific evidence, such as a cash hoard, to suggest that the starting point was inaccurate or misleading.

Appellant's other contentions are without merit and require no comment.